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ALEXANDER L. STEVAS,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SANTA FE ENGINEERS, INC.,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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QUESTIONS PRESENTED

1. Whether certification of a claim pursuant to section 6(c)(1) of the Contract Disputes Act of 1978 is a jurisdictional prerequisite to direct appeal to the Court of Claims under section 10 of the Act?

2. Whether a contractor's failure to certify its claim under section 6(c)(1) of the Contract Disputes Act of 1978 prior to the issuance of the final decision by the contracting officer precludes the contractor from thereafter making an election to proceed to the Court of Claims under sections 10 and 16 of the Act?

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v.

THE UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner Santa Fe Engineers, Inc. respectfully prays for a writ of certiorari to the United States Court of Claims to review that court's orders of June 4, 1982 and July 16, 1982, in *Santa Fe Engineers, Inc.* v. *United States*, No. 309-81C.

OPINION BELOW

The orders issued by the United States Court of Claims on June 4, 1982 and on July 16, 1982, from which review is sought by this petition, are not yet officially reported. The order of June 4, 1982, is included in the Appendix as Exhibit A. The order of July 16, 1982, issued pursuant to petitioner's request for reconsideration, is included in the Appendix as Exhibit B.

JURISDICTION

The initial order to which petitioner filed its Motion for Reconsideration was issued on June 4, 1982. The Order of the

United States Court of Claims responding to petitioner's Motion for Reconsideration was entered on July 16, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1255(1) and 28 U.S.C. §2101(c).

STATUTE INVOLVED

This case involves sections 6, 7, 10, 12 and 16 of the Contract Disputes Act of 1978, 41 U.S.C. §§601 note, 605, 606, 609, 611. These statutory provisions are included in the Appendix as Exhibit C.[1]

STATEMENT OF THE CASE

Petitioner, Santa Fe Engineers, Inc., is a general contractor involved in the construction of projects primarily for the United States Government. On June 4, 1976, the Naval Facilities Engineering Command ("NAVFAC") awarded petitioner Contract No. N62 474-75-C-6276 for the construction of a hospital and related support facilities in Bremerton, Washington. The contract included the then standard disputes clause (1964 June). Ex. D.

During the course of the project, a number of disputes arose concerning the interpretation of the contract's plans and specifications. In an effort to avoid costly individual litigation of each one of these disputes, the parties agreed, in early 1978, to suspend resolution of all current and future disputes until the end of the job, when petitioner was to present all disputes in one overall claim.

In accordance with this agreement, petitioner, on March 17, 1980, submitted its overall claim (hereinafter referred to as its "Global Claim") on the project to the contracting officer. This Global Claim encompassed claims which had previously been the subject of contracting officers' final decisions[2], along with

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[1] Hereinafter, Exhibits in the Appendix are referred to as "Ex.___".

[2] There were eighteen (18) such claims included in the Global Claim. For six of these claims, the contracting officer denied petitioner's request for relief in final decisions issued prior to March 1, 1979, the effective date

several "new disputes"[3] for which final decisions had not been issued. The Global Claim did not at that time contain the certification language of section 6(c)(1) of the Contract Disputes Act of 1978 ("the Act").[4]

Between its submission on March 17, 1980 and the issuance of Final Decision 81-7 on January 9, 1981, petitioner's Global Claim was analyzed by government officials and was the subject of negotiations between petitioner and respondent. Additionally, the claims and disputes were subjected to audit by Defense Contract Audit Agency auditors. When attempts to settle the disputes failed on November 18, 1980, petitioner requested a final decision from the contracting officer and advised respondent that it intended to appeal the final decision directly to the Court of Claims under the Contract Disputes Act. Ex. E. At no time during this period did respondent request a certification pursuant to the Contract Disputes Act.

On January 9, 1981, the contracting officer essentially denied petitioner's Global Claim, including the "new disputes", in Final Decision 81-7.[5] Ex. F. In so doing, the contracting officer advised petitioner of its appeal rights with the following language:

> This is the Final Decision of the Contracting Officer. Decisions on disputed questions of fact and other questions that are subject to the procedure of the Disputes Clause may be appealed in accordance with the provisions of the Disputes Clause. . . . *You are also advised that under the Contract Disputes Act of 1978,*

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of the Contract Disputes Act of 1978. The other twelve claims were decided adversely to petitioner in final decisions rendered after March 1, 1979. In anticipation of a future consolidated action on these claims, petitioner appealed each of these final decisions to the Armed Services Board of Contract Appeals (ASBCA) and then (pursuant to an agreement reached with the Government) had each appeal dismissed without prejudice.

[3]These "new disputes" included several subcontractor claims and the overall impact claim for the project, and were priced at several million dollars.

[4]Petitioner was at that time still proceeding under the contract's disputes clause which did not require that claims be certified. The Global Claim did, however, contain the DD Forms 633 "Truth in Negotiation" certification.

[5]The contracting officer granted $147,580 on the total claim of $18,319,453.

> *Public Law 95-563 (codified at 41 U.S.C. §601, et. seq.), you may elect to have your appeal processed pursuant to the provisions of that Act.* (Emphasis added.)

In accordance with this language and under the authority of sections 10 and 16 of the Contract Disputes Act, petitioner then appealed Final Decision 81-7 to the United States Court of Claims by filing a petition on May 5, 1981. The petition sought direct access to the Court of Claims for a *de novo* review of that final decision.

On November 23, 1981, respondent filed a Motion For Summary Judgment in which it argued that the court had no jurisdiction to consider the "new disputes" decided by Final Decision 81-7 because they had not been certified in accordance with section 6(c)(1) of the Act.[6] Petitioner responded to this Motion For Summary Judgment on January 12, 1982, by asserting that the lack of certification of the "new disputes" was not a bar to the court's exercise of jurisdiction under the Act.[7] Petitioner requested that the court hold that it had jurisdiction over all of the claims included in the petition under the "direct access" provisions of the Act and that it determine that it was the proper forum for disposition of all the claims.

On February 24, 1982, the Court of Claims issued its decision in *Paul E. Lehman, Inc.* v. *United States*, 230 Ct. Cl. _____, 673 F.2d 352 (1982), for the first time indicating the significance which it intended to attach to the certification language of the Act. Thereafter, on April 8, 1982, petitioner provided respondent with an appropriate certification of its Global Claim.

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[6] Respondent also argued that petitioner had elected to proceed under the disputes clause of the contract instead of under the Act with respect to the 18 claims originally filed at the ASBCA, *see* note 2, *supra*, and that Final Decision 81-7 was not a reconsideration of those original 18 claims. However, those arguments are not relevant to the grounds for granting petitioner's request for a writ of certiorari with respect to the "new disputes."

[7] Petitioner also opposed respondent's other arguments.

On June 4, 1982, the Court of Claims issued an order wherein it granted respondent's motion for summary judgment to the extent that the petition was dismissed without prejudice.[8] In so doing, the court declined to decide which, if any, of the claims, including the "new disputes", were properly before it under the Act, and whether any of the claims could be transferred to the ASBCA under section 10 of the Act.

In response to this order, petitioner on June 18, 1982, filed a Motion For Reconsideration in which it requested, *inter alia*, that the court transfer the "new disputes" to the ASBCA pursuant to section 10(d) of the Contract Disputes Act.[9] Respondent opposed petitioner's request by motion filed on June 28, 1982.

By order dated July 16, 1982, the Court of Claims disposed of these motions by stating that it would take "no position whatsoever" on the status of the "new disputes." The court did state, however, that "[b]ecause plaintiff did not certify the new parts of its so-called 'global claim', [it] had no 'direct access' to this court on those aspects of that claim under [the Act].[10] Accordingly, the court did not transfer the new claims to the ASBCA under section 10(d) of the Act.

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[8]The court determined that five or six of the original 18 claims formerly appealed to the ASBCA, *see* note 2, *supra*, had been decided by the contracting officer prior to March 1, 1979, and had not been reconsidered in Final Decision 81-7. For this reason, the court held that these "pre-Act claims" were not subject to the Act and could not be consolidated for review at the court.

[9]Unlike the original 18 claims described in note 2, *supra*, the "new disputes" had never been formally docketed at the ASBCA prior to the submission of the petition at the Court of Claims, because of petitioner's election to take them directly to the Court of Claims under the "direct access" provisions of the Act.

[10]The court cited *Paul E. Lehman, Inc.* v. *United States*, 230 Ct. Cl. ____, 673 F.2d 352 (1982) as support. That decision, as clarified in *W. H. Moseley Co.* v. *United States*, 230 Ct. Cl. ____, 677 F.2d 850 (1982), *petition for cert. filed*, 50 U.S.L.W. 3998.20 (U.S. June 21, 1982) (No. 81-2323), holds that certification of claims under section 6(c)(1) of the Act is a jurisdictional prerequisite to direct access to the Court of Claims under the Act.

This refusal by the court to exercise its jurisdiction over petitioner's claims is the basis of this petition.

Since the issuance of the court's order of July 16, 1982, petitioner has attempted to proceed with all of its claims at the ASBCA. To date, however, it is not clear whether the Board will assume jurisdiction over any of the "new disputes" decided in Final Decision 81-7.[11] Should the Board decline to assume jurisdiction over these new claims, petitioner will not only have lost its right to litigate at the Court of Claims, but will be denied its substantial right to a resolution of these disputes in any forum.

REASONS FOR GRANTING THE WRIT

I.

NATIONAL IMPORTANCE OF THE ISSUES

The Contract Disputes Act implements a new disputes procedure to be followed by contractors and the government in resolving claims relating to government contracts. This new procedure is mandatory for all contracts awarded on or after March 1, 1979. The new procedure is also applicable, at the election of the contractor, to all claims decided after March 1, 1979, which arise out of contracts awarded prior to that date.[12] Accordingly, the Act affects an innumerable number of contractors and claims.

Prior to the Act, government contracts contained a "disputes" clause requiring that the parties proceed with their contract disputes through administrative channels. Under this clause, a contractor wishing to challenge a contracting officer's final decision was required to appeal that decision to

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[11] Respondent, by motion filed on August 3, 1982, has requested that petitioner's new claims be dismissed at the Board as untimely filed.

[12] With respect to pre-March 1, 1979 contracts, section 16 of the Act provides that "[T]he contractor may elect to proceed under this Act with respect to any claim pending then before the contracting officer or initiated thereafter." Contract Disputes Act of 1978, Pub. L. No. 95-563, §16, 92 Stat. 2391, 41 U.S.C. §601 note (Supp. IV 1980).

the agency's administrative board of contract appeals. Access to the Court of Claims was available only after completion of the administrative board process, for a limited review of that board's decision. Wunderlich Act, §§ 1, 2, 41 U.S.C. §§321-22 (1954).

The Act has significantly expanded the alternatives available to contractors for processing disputes. Of special importance to this case is section 10 of the Act which gives contractors the option of appealing final decisions of the contracting officer directly to the Court of Claims, rather than to the administrative board. 41 U.S.C. §609(a)(1). This "direct access" option, one of the keystones of the entire reform system established by the Act, was intended to assure contractors of "a full judicial hearing on a claim they deem important enough to warrant the maximum due process available under our system."[13]

Through its decisions in *Lehman* and subsequent cases[14], the Court of Claims has unreasonably and unnecessarily limited its jurisdiction under the direct access provision of the Act. The result is to deny contractors, like petitioner, of a forum in which to litigate legitimate claims.

II.

COURT OF CLAIMS' INTERPRETATION IS NOT SUPPORTED BY THE PLAIN LANGUAGE OF THE ACT

In dismissing the "new disputes" in petitioner's "direct

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[13] S. Rep. No. 1118, 95th Cong., 2d Sess. 12, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5246.

[14] *Paul E. Lehman, Inc.* v. *United States*, 230 Ct. Cl. ____, 673 F.2d 352 (1982); *Tri-Central, Inc.* v. *United States*, Ct. Cl. No. 275-81C (order entered March 23, 1982); *W. H. Moseley Co.* v. *United States*, 230 Ct. Cl. ____, 677 F.2d 850 (1982), *petition for cert. filed*, 50 U.S.L.W. 3998.20 (U.S. June 21, 1982) (No. 81-2323); *Parrino Enterprises* v. *United States*, Ct. Cl. No. 481-81C (order entered June 4, 1982); *Troup Bros., Inc.* v. *United States*, Ct. Cl. No. 622-80C (order entered June 8, 1982); *J&L Janitorial Services, Inc.* v. *United States*, Ct. Cl. No. 567-81C (order entered July 16, 1982); *Skelly and Loy* v. *United States*, No. 8-82C, slip op. (Ct. Cl. Aug. 11, 1982).

access" suit for lack of jurisdiction, the Court of Claims relied upon its decision in *Lehman*. *Lehman* held that:

> [U]nless a claim has been *properly certified*. . .there is simply no claim that this court may review under the act. (Emphasis added.)

673 F.2d at 355. As further defined in *Moseley*, "properly certified" means certified prior to the issuance of the contracting officer's final decision. 677 F.2d at 852. *Moseley* also makes it clear that the court considers certification prior to the issuance of a final decision to be a jurisdictional prerequisite to obtaining direct access to the Court of Claims under the Act.

The plain language of the Act simply does not support this Court of Claims' interpretation of the certification requirement. The claims submission process is covered by section 6(a) of the Act. 41 U.S.C. §605(a). That section merely requires that claims be in writing, that they be submitted to the contracting officer for a decision, and that each such claim be subject to a final decision which states the reasons therefor and informs the contractor of his rights under the Act. There is *no* mention in this section of a certification requirement, and *no* requirement that certification be provided prior to the issuance of a final decision.

The Act's certification requirement appears two paragraphs later in section 6(c) which deals with the time frame for issuing a final decision. Section 6(c) of the Act advises a contracting officer that he has sixty (60) days in which to issue a final decision or notify the contractor of the time period within which a decision will be issued after receiving a certified claim of over $50,000. There is no indication in this section that certification is a jurisdictional prerequisite. In this context, certification is a procedural device which triggers the running of the sixty (60) day period. Such a procedural requirement, which clearly benefits the government, can be waived. *See McGowan* v. *Parish*, 237 U.S. 285, 294 (1915); *Centex Construction Co.* v. *United States*, 162 Ct. Cl. 211 (1963).[15]

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[15] In *Lehman*, 673 F.2d at 356, the court stated that the certification requirement could not be waived by the contracting officer. In so stating,

Moreover, at least one other section of the Act indicates that it is section 6(a), and not section 6(c) which determines the requirements for a claim. Section 12, concerning *Interest*, reads in pertinent part as follows:

> Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives that claim *pursuant to section 6(a)* from the contractor until payment thereof. 41 U.S.C. §611 (emphasis added).

Again, section 6(a) makes no reference to certification. Yet, the above quoted language in section 12, together with the holdings in *Lehman* and *Moseley*, results in the illogical conclusion that interest begins to run on an uncertified "non-claim" from the time of its submission even though it did not become a "claim" for the purpose of review and analysis until some time later when certification was provided. *See Brookfield Construction Co.* v. *United States*, ____ Ct. Cl. ____, 661 F.2d 159, 166, 168 (1981). Such an illogical result was clearly never intended by Congress.

Finally, section 16 of the Act states the clear intention of Congress that the Act apply, at the election of the contractor, to *any* claim initiated after March 1, 1979. 41 U.S.C. §601 note. The section in no way requires that a claim be certified, and it contains no tie-in between certification of claims and the election to pursue a claim under the Act.

In short, the Court of Claims has created such a restrictive tie-in with virtually no support from the language of the Act.

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the court cited *M-R-S Mfg. Co.* v. *United States*, 203 Ct. Cl. 551, 561-62, 492 F.2d 835, 841 (1974), which interprets the cost and pricing data submission requirement of the Truth in Negotiations Act to be non-waivable. 10 U.S. C. §2306(f). The *M-R-S* case is clearly distinguishable, however, since submission of such data is the only act required of a contractor under that statute and since that statute specifically designates the time for submission. In fact, were the cost and pricing data requirement held waivable, the Truth in Negotiations Act would be rendered a virtual nullity. By contrast, the certification requirement could have been omitted from the Contract Disputes Act without substantially impairing its purposes.

III.

COURT OF CLAIMS' INTERPRETATION IS NOT SUPPORTED BY THE LEGISLATIVE HISTORY

In holding that certification is a jurisdictional prerequisite to the consideration of any claim under the Act, the Court of Claims stated that "[t]he legislative history of the certification requirement confirms the importance Congress ascribed to it." *Lehman*, 673 F.2d at 355. In fact, however, the legislative history contains no such support. Indeed, as the court itself noted in *Lehman*, "the certification requirement was added to the bill [S. 3178] on the floor of the Senate on the day on which the Senate passed the legislation," and was never mentioned in the Committee reports which accompanied the bill. *Id.* at 354-55.[16] In light of this fact, petitioner submits that more weight has been accorded to the certification requirement by the court than was ever intended by Congress.

During the Congressional hearings on the Act, Admiral Rickover testified concerning the necessity for amending the Act to include a certification requirement. *Contract Disputes Act of 1978: Joint Hearings on S.2292, S.2787 & S.3178 Before the Subcomm. on Federal Spending Practices and Open Government of the Senate Comm. on Governmental Affairs and the Subcomm. on Citizens and Shareholders Rights and Remedies of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 21 (1978) [hereinafter *Joint Hearings*]. From the legislative history, it is clear that Congress considered Admiral Rickover's testimony on the certification requirement to be significant, but only with respect to the commencement of the sixty day time period for the issuance of a final decision by the contracting officer. Thus, Senator Byrd stated:

> Section 5(c) in the reported S.3178 (section 6(c) in the Act as passed by the Senate) has been *amended due to the concerns expressed by* the Department of

[16] In other words, it was a "last minute" addition. There is no indication that it was the product of careful advance study and discussion by the Committee.

> Defense, Senator Proxmire, and *Admiral Rickover* that the provisions of section 5(c), with regard to setting a time limit of 60 days after written request for a decision, were too limiting, especially for large, complex claims. The intent to this provision was to safeguard the interest of the contractor from possible unreasonable delays by contracting officers. This amendment would satisfy both concerns. The ultimate decision as to the appropriate time limit if there is a conflict by the contractor and the contracting officer will be made by the agency board after a petition by the contractor. This will safeguard the contracting officer from an arbitrary and unreasonable request from a contractor on a large complex claim and would also afford the contractor relief from possible delaying tactics of a contracting officer. [Language quoted in *Lehman* emphasized.]

124 Cong. Rec. 36266, 36267 (1978). The quoted language represents the only Congressional comment on the amendments which added the certification requirement to the Act. From the language, it is evident that the intent of Congress in including the certification requirement was not to make certification a jurisdictional prerequisite, but rather, to add flexibility to the commencement of the sixty day time period. Indeed, the comments do not even refer to a certification requirement.[17]

Moreover, Congress has not remained silent while the agencies charged with administering the Act have raised certification as an essential element of a "claim".[18] In a Report of the House Committee on the Judiciary dated May 18, 1981, the following statement concerning certification was included:

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[17] Petitioner asserts that had Congress intended for this requirement to be jurisdictional, it surely would have expressed its intention in some way.

[18] As the court noted in *Lehman*, 673 F.2d at 355, the Defense Acquisition Regulations state that "a claim is not valid until it is certified." DAR §1-314(b)(1), 45 Fed. Reg. 81402, 81406 (1980).

> When Congress enacted the Contract Disputes Act of 1978, it was understood that submission of a claim in writing to a contracting officer under section 6(a) was the starting point for interest to begin to run on a contract claim. The separate provisions of section 6(c) requiring the "certification" of a claim and its supporting data when the claim is in excess of $50,000 was intended as a condition precedent to payment but was not a delayed starting point for the interest accruing period. Certain agencies have argued that they have not "received" a claim under the Act until the necessary certification data has been submitted. This is not the correct interpretation. In fact, it often leads to an unfair result in that a contractor does not have all the necessary supportive data available to satisfy certification procedures, when he initially notifies the agency in writing of a contract claim. It is likewise impossible for the contractor, at this stage of the proceeding, to anticipate what supplemental data might be requested by the contracting officer in the course of consideration of the claim. Certification under section 6(c) should not be viewed as a prerequisite to "receipt" of a claim under section 6(a).

H.R. No. 97-47, 97th Cong., 1st Sess. 3 (1981).[19] Because these comments are made by the same committee which dealt with the Contract Disputes Act of 1978, they should be accorded substantial weight. *See, Brookfield Construction Co.*, 661 F.2d at 164. Such expressions of legislative intent support the conclusion that the certification requirement is irrelevant for purposes of jurisdiction under the Act.

IV.

COURT OF CLAIMS' INTERPRETATION FRUSTRATES THE CONGRESSIONAL PURPOSE IN PROVIDING DIRECT ACCESS TO THAT COURT

The legislative history of section 10 of the Act makes it clear that direct access to the Court of Claims was included in

[19]The bill under consideration would have amended section 12 of the Act, 41 U.S.C. §611, which is not in issue here.

the Act as a remedial measure,[20] to redress problems created by the Wunderlich Act[21] and various Court decisions.[22] Congress intended for this section of the statute to reduce confusion and delay in the resolution of disputes.[23] To a large extent, however, these goals have been frustrated by the court's determination in *Lehman* that "unless a claim has been properly certified,

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[20] S. Rep. No. 1118, *supra* note 13, provides at 12:

> Direct access to courts guarantees that, at the option of the contractor, the remedial process extends from the contracting officer to the courthouse on all aspects of a dispute. . . .
>
> *****
>
> [D]irect access should strengthen Government procurement by broadening the scope of remedies available to the contractor. . . .

[21] 41 U.S.C. §§321-22 (1954).

[22] *See e.g., United States* v. *Bianchi*, 373 U.S. 709 (1963) (reviewing court could not conduct trial *de novo* but was confined to review of administrative record and should remand to board if additional factual findings were necessary); *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394 (1966) (boards only had jurisdiction over those disputes which could be resolved pursuant to a remedy-granting clause in the contract); *S&E Contractors, Inc.* v. *United States*, 406 U.S. 1 (1972) (Government had no right of appeal from board decision).

[23] In this regard, S. Rep. No. 1118, *supra* note 13, provides at 12:

> The considerable disharmony between the administrative and judicial systems that oversee the resolution of disputes was a matter of considerable concern to the Procurement Commission. There is, at present, ongoing competition for jurisdiction of contract claims. The fact-law dichotomy under Wunderlich Act standards, judicial suspension for further administrative factfinding, and remand to the boards for a quantum determination, unnecessarily confuse and delay the resolution of disputes. Since it is unlikely that these problems could be resolved by merely granting the administrative boards "all disputes" authority, and not granting the contractor direct access, the only pragmatic answer was to do both. ***Allowing the contractor direct access to the judicial remedy, and allowing the boards to handle all claims, will cut down the present traffic between the boards and the courts, thus reducing the points of friction and eliminating delays.*** (Emphasis added.)

it cannot be considered under the statute" and cannot be reviewed by the court under the Act. *Lehman*, 673 F.2d at 355; *see also Folk Construction Co.* v. *United States*, Ct. Cl. No. 99-80C (order entered Jan. 16, 1981), *rehearing denied*, (order entered Mar. 6, 1981). The court's recent pronouncement in *Skelly and Loy* v. *United States*, No. 8-82C, slip op. (Ct. Cl. Aug. 11, 1982) is perhaps the clearest example of the unreasonable procedural burdens placed upon contractors by the *Lehman* holding.[24]

The legislative history of section 10 of the Act also makes it clear that the direct access provisions contained therein do not constitute a new waiver of sovereign immunity.[25] For this reason, the doctrine of strict construction does not apply. *E.G.*, *Brookfield Construction Co.*, 661 F.2d at 165; *Lykes Bros. S.S. Co.* v. *United States*, 206 Ct. Cl. 354, 375, 513 F.2d 1342, 1353 (1975); *see also National Electric Coil* v. *United States*, Ct. Cl. No. 79-80C (order entered on Mar. 17, 1981).[26]

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[24] In *Skelly and Loy*, the court dismissed a contractor's petition for lack of jurisdiction after finding that the contractor had not certified his post-Act claim on his post-Act contract in accordance with section 6(c)(1) of the Act. The court directed the contractor to resubmit his claim, with certification, to the contracting officer and start the procedure anew. Thus, although the contractor will have a second chance to litigate his claim, he wasted years in his good faith effort to comply with the Act. Such a result is obviously not in keeping with the Congressional intent of streamlining appeal procedures.

[25] In this regard, the legislative history states:

> The rationale of the Tucker Act, which greatly limited the doctrine of sovereign immunity, was that the government subjects itself to judicial scrutiny when it entered the marketplace, and should not be the judge of its own mistakes nor adjust with finality any disputes to which it is a party. *Direct access to court does no more than reaffirm the intent of the Tucker Act.* (Emphasis added.) S. Rep. No. 1118, *supra* note 13, at 12.

[26] In *National Electric Coil*, the court recognized that:

> The rule of strict construction of the consent to be sued is not for application when the issue to be decided is which of two consents is to be chosen as the one applicable, it being conceded that one or the other can be invoked.

In fact, in view of the remedial nature of the Act,[27] the court should have construed the language of section 10 in a liberal fashion. *See Lykes Bros.*, 206 Ct. Cl. at 375, 513 F.2d at 1353. The court's decision to restrict its jurisdiction to claims certified in accordance with section 6(c)(1) of the Act is, therefore, inconsistent with the Congressional view of the Act.

V.

COURT OF CLAIMS' INTERPRETATION IS NOT CONSISTENT WITH ITS DECISIONS IN PRIOR CASES

In holding that certification prior to the final decision of the contracting officer is a requirement for jurisdiction under the Act, the Court of Claims sets up a direct conflict with at least two of its prior lines of interpretation concerning certification and election to proceed under the Act.[28] Taken as a group, these decisions establish an inconsistent and unworkable statutory scheme which government contractors, like petitioner, must interpret at their own peril.

In *Folk Construction Co.* v. *United States*, Ct. Cl. No. 99-80C (order entered Jan. 16, 1981), *rehearing denied* (order of Mar. 6, 1981), the Court of Claims held that, where a contractor submits a claim prior to the effective date of the Act (March 1, 1979), and a final decision is issued thereafter, certification is not required for a direct appeal to the Court of

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[27] The principal purpose of the Act was to "[reestablish] principles of equitable treatment, for both the Federal Government and the Government contractors in contract disputes and claims." *Joint Hearings, supra* p. 10, at 1 (statement of Senator Lawton Chiles). This remedial purpose is confirmed by the bill's legislative history which states that the Act is to provide "a fai., balanced, and comprehensive statutory system of legal and administrative remedies in resolving Government contract claims." S. Rep. No. 1118, 95th Cong., 2d Sess. 31, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5235.

[28] Petitioner did not request a hearing or rehearing en banc at the Court of Claims in spite of these conflicts, since it determined that the *Lehman* holding had been followed by substantially all of the judges at the court. *See* cases cited in note 14, *supra*.

Claims under the Act. *See also Brookfield Construction Co.*, v. *United States*, Ct. Cl. No. 428-80C (order entered Mar. 27, 1981). The Court of Claims attempts to distinguish *Folk* from *Lehman* on the ground that *Folk* involved claims filed before the effective date of the Act. *Lehman*, 673 F.2d at 356. However, that attempted distinction fails to explain how certification can be a "jurisdictional prerequisite" for some, *but not all* claims under the Act[29]. The basis for the Court's distinction is also not apparent from either the legislative history or the text of the Act.[30]

The other major line of cases in conflict with the *Lehman/Moseley* holding originated with the Court of Claims' decision in *Tuttle/White Constructors, Inc.* v. *United States*, 228 Ct. Cl. ____, 656 F.2d 644 (1981), a case in which the court discussed the election provision of section 16 of the Act and the direct access provision of section 10(a)(1). In *Tuttle/White*, the court held that the contractor had elected to proceed under pre-Act law by filing a notice of appeal at the ASBCA which did not mention the Contract Disputes Act. In so holding, the court acknowledged that the Act "does not set forth a specific time period within which an election to proceed under the Act must be made", but understood that a "contractor is under certain compulsions of time and choice that point to a requirement that the contractor make a positive election whether to come under the act" at an appropriate time and in an appropriate manner. *Id.* at ____, 656 F.2d at 647. As an example, the court noted that in a pre-March 1, 1979 contract situation, a contractor who decides to come under the Act and proceed directly to the court, must implement that election by filing a petition at the court within twelve (12) months of the contracting officer's final decision. The court stated specifically, however, that a contractor is under no obligation to make such an election before the expiration of the twelve month filing period. *Id.*

[29] It is noteworthy that the decision in *Folk*, the first word on this matter, was issued *after* the contracting officer rendered Final Decision 81-7.

[30] Section 16 of the Act, the election provision, makes no distinction between *Folk*-like ("pending") claims and *Lehman*-like ("initiated thereafter") claims.

The *Lehman/Moseley* requirement that claims be certified in accordance with the Act prior to the issuance of a final decision by the contracting officer is inconsistent with the rationale of the *Tuttle/White* decision. *Lehman* and *Moseley* make it clear that a contractor can no longer make a valid election to proceed under the Act by timely filing a petition directly in the Court of Claims *unless* he certified his claims prior to the issuance of a final decision. Yet, if the contractor did provide such certification to the contracting officer prior to a final decision, he could well be deemed, under the rationale of *Tuttle/White*, to have made a binding election to proceed under the Act. The ultimate effect of *Lehman* and *Moseley*, therefore, is to require contractors with pre-Act contracts to elect between pre-Act and post-Act law at the time of claim submission. This result is surely not in keeping with the court's earlier construction of the election provision in *Tuttle/White*.

Although a certification requirement and *de facto* time constraints on election may not appear manifestly unfair on their face, they are devastating to contractors, like petitioner, who had no way of knowing that their right to elect to proceed under the Act was contingent on their having certified their claims to the contracting officer.[31] This is particularly true where, as here, a court's interpretations of the provisions of a new statutory scheme are so internally inconsistent as to indicate that one or more of its lines of decision is incorrect.

VI.

INEQUITABLE DEPRIVATION OF FORUM IN WHICH TO LITIGATE CLAIMS

By restricting its direct access jurisdiction to claims certified in accordance with section 6(c)(1) of the Act, the Court of Claims has not only deprived petitioner, and all other similarly

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[31] Prior to the court's decision in *Lehman*, none of the leading commentators in the field of Government Contracts anticipated the emergence of certification as a jurisdictional prerequisite. *See e.g.*, 2 R. Nash, Jr. & J. Cibinic, Jr., *Federal Procurement Law* 2037-2041, 2083-2084 (1980); Knight, *Guidelines for Certification of Claims and Requests for Relief*, Contract Management, October 1981, at 4.

situated contractors, of the choice of forum provided by the Act, but may very well have deprived petitioner of *any* forum whatsoever in which to litigate his claims. This result is fundamentally unfair to petitioner. *See Boddie* v. *Connecticut*, 401 U.S. 371 (1971); *Atkins* v. *United States*, 214 Ct. Cl. ____, 556 F.2d 1028, 1044 (1977), *cert. denied* 434 U.S. 944 (1978).

Petitioner submitted its Global Claim to the contracting officer during the "transitional" period from the "old" disputes clause procedure to the "new" procedures created by the Contract Disputes Act. The submission of the Global Claim predated agency pronouncements on the necessity of certification,[32] as well as the Court of Claims' decisions in *Lehman* and *Moseley*. As a result, petitioner had to proceed under new and unsettled law, without the benefit of judicial, administrative or legislative guidance that certification would subsequently be deemed a jurisdictional prerequisite to proceeding under the Act.

Petitioner's determination that it could proceed under the Act, without certification, was in large part due to language in the contracting officer's final decision advising petitioner of its right to appeal under the Act. This advice, which later proved erroneous, is indicative of the government's own confusion during this transition period concerning the Act's certification requirement. To bar petitioner from proceeding under the Act because of its non-compliance with what was not at the time recognized to be a requirement, would be to hold petitioner to a higher standard of knowledge and foresight than could reasonably be expected of the agency charged with administering the Act. Yet, the Court of Claims' decisions in *Lehman* and *Moseley* would have this effect on petitioner. Indeed, the current holding of the Court of Claims in dismissing petitioner's Complaint has the effect of penalizing this contractor for failing to comply with a requirement, beneficial to the government, which the government itself had construed as non-essential.

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[32] The Office of Federal Procurement Policy issued a final regulation revising the disputes clause on April 29, 1980. 45 Fed. Reg. 31,035. The revised clause, which applies to all contracts entered into after June 1, 1980, contains a certification requirement.

The inequities involved in denying petitioner access to the Court of Claims are further exacerbated by the court's recent pronouncements in *Skelly and Loy*, No. 8-82C, slip op. (Ct. Cl. Aug. 11, 1982). In *Skelly and Loy*, the contractor failed to certify his claim pursuant to section 6(c)(1) of the Act even though his post-Act contract was automatically covered by the Act. The court held that without certification, there was no "claim", and so, no valid final decision from which an appeal could be taken. For this reason, the court directed the contractor to certify his claim, and to resubmit it to the contracting officer for an appealable final decision. Thus, in *Skelly and Loy*, the failure to certify wasted a considerable amount of the contractor's time, but did not deprive the contractor of an opportunity to litigate his claims; the contractor was, in essence, given a second chance.

By contrast, petitioner's failure to certify its "new claims" could well prevent it from ever litigating those claims. Because petitioner's claims were submitted under a pre-Act contract, the lack of certification did not automatically invalidate the contracting officer's final decision. For this reason, the holding in *Skelly and Loy* may not apply to petitioner's situation. Consequently, if the holdings in *Lehman* and *Moseley* are upheld, petitioner will not even be accorded the same substantive rights available to post-Act contractors who may re-certify and re-submit their disputes (i.e., *Skelly and Loy*)[33]; or to pre-Act contractors on pre-Act claims who need not certify at all.

Petitioner asserts that the Contract Disputes Act was enacted as a remedial statute and that, as such, it was never the intent of Congress to deny a contractor the right to have his

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[33] In a recent decision by the Board of Contract Appeals of the Department of Agriculture (AGBCA), that Board suggested that the holding in *Skelly and Loy* might be applicable to cases involving post-Act claims submitted under pre-Act contracts. Paul E. Lehman, Inc., AGBCA No. 82-241-1, slip op. at 5 (Sept. 3, 1982). To date, however, this view has not been adopted by either the Court of Claims or the ASBCA.

claims and disputes heard in any forum.[34] This is particularly true where, as in the instant case, the government's representatives were familiar with the substance of the claims for an extensive period of time, the claims had been audited and reviewed by the government prior to the issuance of the final decision, and where the contractor certified the claims, as originally submitted, when it became apparent that certification might be required. In that regard it must also be noted that the government never made a formal demand for certification, even though, well before the issuance of the final decision, it was made aware of petitioner's desire to seek direct access to the Court of Claims. Ex. D. Thus, in the instant case, the government was in no way prejudiced by petitioner's failure to submit a certification in accordance with *Lehman* and *Moseley*.

CONCLUSION

The court's interpretation of the Act's certification requirement is manifestly contrary to the text, legislative history and purpose of the Act. The interpretation has not only complicated procedures under the Act, but has deprived contractors of a forum in which to litigate their claims. Congress never intended for the Act or its certification requirement to serve as a trap for unwary contractors.

To deny petitioner its right to litigate legitimate claims because of an unanticipated and unsupportable interpretation of the Act by the Court of Claims is a fundamental denial of due process which works a gross inequity on this, and all other similarly situated, contractors.

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[34] Nevertheless, the government is currently arguing that petitioner's election to proceed before the Court of Claims, even though ineffective, precludes petitioner from now seeking resolution of those disputes before the administrative board. If the government prevails, petitioner will have been denied its substantial right to have its claims heard in *any* forum.

For the foregoing reasons, petitioner respectfully urges the Court to grant this petition for a writ of certiorari to review the orders of the Court of Claims.

Respectfully submitted,

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October 14, 1982

APPENDIX A

Exhibit A

IN THE UNITED STATES COURT OF CLAIMS

No. 309-81C

SANTA FE ENGINEERS, INC.	)	
	)	Government contracts; Contract Disputes Act; transfer to the ASBCA; need for consolidation
v.	)	
	)	
	)	
THE UNITED STATES	)	

Walter A.I. Wilson, attorney of record, for plaintiff. *Robert J. Martinez* and *Kilcullen, Wilson and Kilcullen*, of counsel.

William S. Liebman, with whom was *Assistant Attorney General J. Paul McGrath*, for defendant. *Louis R. Newman* and *Jeffrey H. Schneider*, Department of the Navy, of counsel.

Before DAVIS, NICHOLS and SMITH, *Judges*.

ORDER

Plaintiff Santa Fe Engineers, Inc. appeals under the "direct access" of the Disputes Act of 1978, 41 U.S.C. §§ 601 *et seq*. (Supp III 1979), from an adverse decision of the contracting officer. It seeks an equitable adjustment of $18,260,345 allegedly owing from the United States for additional costs incurred as a result of contract modifications and delays resulting from such changes. Defendant moves for summary judgment and plaintiff opposes.

In 1976, Santa Fe Engineers was awarded a contract by the Navy to build a hospital and related support facilities. The contract included the standard disputes clause. A number of disputes over contract specifications arose during the course of the project, and, pursuant to the disputes clause, claims were filed with the contracting officer. For six of the claims, the contracting officer's final decisions denying an adjustment were made prior to March 1, 1979, the effective date of the Contract Disputes Act. The remaining twelve claims were decided adversely to plaintiff after March 1, 1979. Each of these eighteen claims was appealed to the Armed Services Board of Contract Appeals (ASBCA) and assigned a separate docket number by that board. Upon the request of plaintiff, each was then dismissed without prejudice in anticipation of a future consolidated action of these claims, plus later claims arising under the contract.

On March 17, 1980, plaintiff filed an overall equitable adjustment claim, a so-called "global" claim, which included all of the pending disputes plus new claims based on the impact of the individual disputes. The contracting officer denied, in relevant part, plaintiff's requests in a final decision issued January 1981. On May 5, 1981, plaintiff filed this petition under § 10(a) of the Contract Disputes Act, 41 U.S.C. § 609(a) (Supp. III 1979), seeking direct *de novo* review in this court of that decision, including those claims which are identical to the eighteen claims previously appealed to the ASBCA.

On March 11, 1981, the ASBCA issued a notice reinstating, consolidating and redocketing the original eighteen appeals. On May 6, the board accepted the petition filed in this court as plaintiff's complaint in the consolidated board action. The board appeal has been suspended for six months pending a decision on the jurisdictional questions presented here.

Defendant contends that we lack jurisdiction because, for the eighteen claims repeated in the "global" claim, the original appeal to the ASBCA was a binding election to proceed under the disputes clause and not under the Contract Disputes Act, and, for the novel claims, that plaintiff failed to certify its claims before the contracting officer.

Both parties agree that it would be in the interest of justice to have all of the claims decided in one forum; plaintiff argues for consolidation here and the defendant argues for transfer to the ASBCA.[1] We are generally empowered to take either action by a broad transfer provision of the Contract Disputes Act. 41 U.S.C. § 609(d) (Supp. III 1979).

Without deciding most of the issues proffered to us, we do conclude that the fatal problem for plaintiff is that five[2] of the original claims appealed to the board were decided by the contracting officer prior to March 1, 1979. Those cannot be directly appealed here, even under the consolidation section of the statute. *Warwick Construction, Inc.* v. *United States*, Ct. Cl. No. 85-80C, at 5-6 (order to August 29, 1980); *Roubin & Janeiro, Inc.* v. *United States*, Ct. Cl. No. 396-80C, at 6 (order of March 13, 1981). *See* S. REP. No. 1118, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 5235, 5269.

The contracting officer's post-Act decision on the "global" claim cannot be viewed as a reconsideration of those five or six original claims.[3] There is no direct mention of those claims nor any ambiguous language which might be linked to the prior claims. Plaintiff's reference to a general paragraph denying all claims not specifically mentioned is adequately explained as a denial of new claims not explicitly addressed in the "global" decision. This interpretation of the final decision is confirmed by the contracting officer in his affidavit submitted by defendant.

Because it is clear, as both sides agree, that all of the plaintiff's claims should be consolidated and heard together, and

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[1] Defendant contends for transfer as an alternative argument if we find some of the claims to have been properly certified and properly before us on appeal.

[2] It is unclear whether the number of pre-Act claims included in the petition is five or six. The exact number is not material to our decision.

[3] Plaintiff argues that such a reconsideration after March 1, 1979, would allow it to elect to appeal prior decided claims to this court under the Contract Disputes Act. We do not decide that issue because we find that no reconsideration occurred.

because we cannot consolidate in this court the claims decided prior to the Act, we would certainly transfer to the ASBCA all the "direct access" claims now properly in this court if we were called upon to do so. We need not, however, take that course, nor need we decide which (if any) of the claims stated in the petition can properly be brought here under the Disputes Act at this time. The reason is that all of plaintiff's claims are now pending before the ASBCA which has accepted the petition in this case as plaintiff's complaint in the board proceedings. The disputes can all go forward before the ASBCA in that one proceeding.

For this reason, defendant's motion for summary judgment is granted (without oral argument) only to the extent that the petition here is dismissed without prejudice (except that we do determine that we have no jurisdiction over the five or six pre-Act claims discussed above). This disposition makes it unnecessary for us now to consider, and we leave undecided, whether any of plaintiff's claims before the ASBCA properly fall under the Contract Disputes Act (for purposes of interest, certification, subpoena rights, etc.).

BY THE COURT

/s/ Oscar H. Davis

Oscar H. Davis
Judge

June 4, 1982

APPENDIX B

Exhibit B

IN THE UNITED STATES COURT OF CLAIMS

No. 309-81C

SANTA FE ENGINEERS, INC.

v.

THE UNITED STATES

Walter A.I. Wilson, attorney of record, for plaintiff. *Robert J. Martinez* and *Joanne Becker, Kilcullen, Wilson and Kilcullen*, of counsel.

William S. Liebman, with whom was *Assistant Attorney General J. Paul McGrath*, for defendant. *Louis R. Newman* and *Jeffrey H. Schneider*, Department of the Navy, of counsel.

Before DAVIS, NICHOLS, and SMITH, *Judges*.

ORDER

PER CURIAM: Our order of June 4, 1982, in this case dismissed the petition, in part with prejudice and in part without prejudice. We left the case to the ASBCA. Each party moves for reconsideration. Plaintiff seeks an explicit declaration from us that all matters contained in its petition are properly before the ASBCA. Defendant asks precisely the opposite as to major aspects of the case.

We thought our original order said expressly that we left wholly undecided whether any of the plaintiff's claims before

the ASBCA properly fall under the Contract Disputes Act or did not so fall for any reason. In any event, we now say explicitly that we take no position whatever on the Board's jurisdiction over plaintiff's claims or any part of them, either under the Contract Disputes Act or otherwise. Because the Board has before it a replica of plaintiff's petition in this court, the court is of the view that the Board can and should decide whether it has authority to consider any or all of the claims on their merits (under the Contract Disputes Act or pre-Contract Disputes Act law).* All those issues are left wholly to the Board. The petition in this court is dismissed and the motions for reconsideration and clarification are otherwise denied.

IT IS SO ORDERED.

JUL 16, 1982

*Because plaintiff did not properly certify the new parts of its so-called "global claim," plaintiff has no "direct access" to this court on those aspects of that claim under the Contract Disputes Act. *E.g.*, *Paul E. Lehman, Inc.* v. *United States*, 230 Ct. Cl. ____, 673 F.2d 352 (1982).

APPENDIX C

Exhibit C

Section 6 of the Contract Disputes Act of 1978, P.L. 95-563, 92 Stat. 2383, codified at 41 U.S.C. §605, provides as follows:

§ *605. Decision by contracting officer – Contractor claims*

(a) All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. The contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided in this chapter. Specific findings of fact are not required, but, if made, shall not be binding in any subsequent proceeding. The authority of this subsection shall not extend to a claim or dispute for penalties of forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine. This section shall not authorize any agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud.

Review; performance of contract pending appeal

(b) The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by this chapter. Nothing in this chapter shall prohibit executive agencies from including a clause in government contracts requiring that pending final decision of an appeal, action, or final settlement, a contractor shall proceed diligently with performance of the contract in accordance with the contracting officer's decision.

Amount of claim; certification; notification; time of issuance; presumption

(c)(1) A contracting officer shall issue a decision on any submitted claim of $50,000 or less within sixty days from his receipt of a written request from the contractor that a decision be rendered within that period. For claims of more than $50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.

(2) A contracting officer shall, within sixty days of receipt of a submitted certified claim over $50,000 –

(A) issue a decision; or

(B) notify the contractor of the time within which a decision will be issued.

(3) The decision of a contracting officer on submitted claims shall be issued within a reasonable time, in accordance with regulations promulgated by the agency, taking into account such factors as the size and complexity of the claim and the adequacy of the information in support of the claim provided by the contractor.

(4) A contractor may request the agency board of contract appeals to direct a contracting officer to issue a decision in a specified period of time, as determined by the board, in the event of undue delay on the part of any contracting officer.

(5) Any failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim as otherwise provided in this chapter. However, in the event an appeal or suit is so commenced in the absence of a prior decision by the contracting officer, the tribunal concerned may, at its option, stay the proceedings to obtain a decision on the claim by the contracting officer.

Section 7 of the Act, P.L. 95-563, 92 Stat. 2385, codified at 41 U.S. C. § 606, provides as follows:

> *§ 606. Contractor's right of appeal to board of contract appeals*
>
> Within ninety days from the date of receipt of a contracting officer's decision under section 605 of this title, the contractor may appeal such decision to an agency board of contract appeals, as provided in section 607 of this title.

Section 10(a)(1), (a)(3) and (d) of the Act, Public Law 95-563, codified at 41 U.S.C. § 609(a)(1), (a)(3) and (d), provides as follows:

> *§ 609. Judicial review of board decisions – Actions in United States Court of Claims, district court actions; time for filing*
>
> (a)(1) Except as provided in paragraph (2), and in lieu of appealing the decision of the contracting officer under section 605 of this title to an agency board, a contractor may bring an action directly on the claim in the United States Court of Claims, notwithstanding any contract provision, regulation, or rule of law to the contrary.
>
> (a)(3) Any action under paragraph (1) or (2) shall be filed within twelve months from the date of the receipt by the contractor of the decision of the contracting officer concerning the claim, and shall proceed de novo in accordance with the rules of the appropriate court.
>
> (d) If two or more suits arising from one contract are filed in the Court of Claims and one or more agency boards, for the convenience of parties or witnesses or in the interest of justice, the Court of Claims may order the consolidation of such suits in that court or transfer any suits to or among the agency boards involved.

Section 12 of the Act, P.L. 95-563, 92 Stat. 2389, codified at 41 U.S.C. § 611, provides as follows:

§ *611. Interest*

Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 6(a) [41 USCS § 605(a)] from the contractor until payment thereof. The interest provided for in this section shall be paid at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41 (85 Stat. 97) for the Renegotiation Board. (Nov. 1, 1978, P.L. 95-563, § 12, 92 Stat. 2389.)

Section 16 of the Act, Public Law No. 95-653, set out as a note under 41 U.S.C. § 601, provides as follows:

This act shall apply to contracts entered into 120 days after the date of enactment. Notwithstanding any provision in a contract made before the effective date of this act, the contractor may elect to proceed under this act with respect to any claim pending then before the contracting officer or initiated thereafter.

APPENDIX D

Exhibit D

DISPUTES

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the head of the agency involved. The decision of the head of the agency or his duly authorized representative for the determination of such appeals shall be final and conclusive. This provision shall not be pleaded in any suit involving a question of fact arising under this contract as limiting judicial review of any such decision to cases where fraud by such official or his representative or board is alleged. *Provided, however*, That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This Disputes clause does not preclude consideration of questions of law in connection with decisions provided for in paragraph (a) above. Nothing in this contract, however, shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

APPENDIX E

Exhibit E

18 November 1980

Commander, Contracting Officer
Naval Facilities Engineering Command
Department of the Navy
Alexandria, Virginia 22332

Attn: Walter S. Evans, Contracts

Re: Contract N62474-75-C-6276
HOSPITAL and SUPPORT FACILITIES
Replacement FY 1976 MCON
Bremerton, Washington
Santa Fe Engineers, Inc. "Close-Out Claim"
of March 17, 1980

Gentlemen:

In view of our inability to reach a stipulated settlement amount in *Santa Fe Engineers, Inc.* v. *U.S.*, 270-79C, we do not feel it is in the best interest of Santa Fe Engineers to further pursue a negotiated settlement of the so-called "close-out" claim submitted under cover of our letter of March 17, 1980.

Please consider this letter our formal request for a Contracting Officer's final decision on the close-out claim. Due to the long pendency of this matter we believe sixty (60) days to be a reasonable time for your office to be able to render that decision.

We intend to pursue this matter in the United States Court of

Claims under the provisions of the Contract Disputes Act of 1978.

Very truly yours,

HUDSON, CREYKE, KOEHLER, TACK & BIXLER

By: /s/ H. Randall Bixler
H. RANDALL BIXLER

cc: Santa Fe Engineers, Inc.
Brinderson Corporation
Julian Hoffar, Esq.
Atlas Plastering Co.

HRB:sjw

APPENDIX F

Exhibit F

DEPARTMENT OF THE NAVY
NAVAL FACILITIES ENGINEERING COMMAND
200 STOVALL STREET
ALEXANDRIA, VA 22332

IN REPLY REFER TO

Final Decision 81-7 09 JAN 1981

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Santa Fe Engineers, Inc.
P. O. Box 831
Lancaster, California 93534

Gentlemen:

The Commanding Officer, Western Division, Naval Facilities Engineering Command, has forwarded your "global" claims under Contract N62474-75-C-6276 for hospital and support facilities replacement, Bremerton, Washington.

By letter of 18 November 1980, your Counsel requested a decision of the Contracting Officer on this "global" claim which is also designated as a "close-out" claim. Your "global" claim plus the request for extension of contract time to and including 21 January 1980, has been carefully reviewed and the Contracting Officer makes the following findings:

1. The following adjustments of time and money are found due the contractor on the unilateral change orders listed below:

Change Order P-00071. The contract price is increased $63,878.00 and the time extended 14 calendar days for phase II.

Change Order P-00072. The contract price is increased $51,101.00 and the contract time is extended 18 calendar days for phase II.

Change Order **P-00075**. The contract price is increased an additional $20,348.00 and the contract time is extended 7 calendar days for phase II.

Change Order **P-00076**. The contract price is increased an additional $102,155.00 and the contract time is extended 27 calendar days for phase II.

Change Order **P-00077**. The contract price is increased an additional $25,778 and the contract time is extended 7 calendar days for phase II.

Change Order **P-00079**. The contract price is increased an additional $10,311.00 and the contract time is extended 2 calendar days for phase II.

Change Order **P-00082**. No change in contract price or contract completion time.

Change order **P-00083**. The contract price is increased an additional $24,323.00 and the contract time is extended 7 calendar days for phase II.

Change Order **P-00085**. The contract price is increased an additional $9,729.00 and the contract time is extended 2 calendar days for phase II.

The total price increase for the above listed unilateral change orders is $307,623.00 and the contract time is extended an additional 84 calendar days for phase II.

2. Your contract price is increased for labor escalation in the amount of (See Exhibit 1 Basis of Computation) $181,360.00

3. Your contract price is increased for material escalation in the amount of (See Exhibit 2 Basis of Computation) $ 39,396.00

4. The following miscellaneous work changes are determined as follows:

Additional Work Description		Contract Price Increase
Wiring for 2 clocks in Rm 4317 (COR 315)		$ 500
Battery Alarm for Generator (COR 264)		$ 645
Electrical Circuit for Type E Directory (COR 217)		$ 278
Fuel Oil for Emergency Generator Testing (COR 321)		$ 5,000
Painting of Mechanical Pipes (COR 301)		$ 1,000
Atlas Change Order Additive Adjustments for P-00072 and P-00077 (COR 165 & 220)		$ 1,994
Additional Warehouse Costs in Storing Equipment for the period 9 December 78 – 22 August 79		$ 2,080
	Additive	$11,497
Substitution of finish metal door closer cover plates (561) (COR 314) and 115 door closers	Deductive	($12,296)
TOTAL Net change in Contract Price		$ 799 deductive

5. The following additional specific items of claim are decided by the Contracting Officer as follows:

a. Your claim for replacing cracked quarry tile in the kitchen area is moot because of the bilateral agreement reached in Modification P00074, whereby it was agreed that previous and future requests for equitable adjustments regarding anything associated with tile in the kitchen would be invalid. Irrespective of this agreement, proper installation of the tile was the ultimate responsibility of the contractor through his

quality control representative. Portions of the kitchen quarry were observed to be cracked and the contractor was directed, under the requirements of the General Provisions of the Contract, to remove and replace the cracked tile. The cracked tile which was replaced in the kitchen area has not subsequently recracked.

When the cracked tile in the visitors' entrance was removed, it was observed by the Resident Officer-in-Charge of Construction that the structural slab under the tile was *not* cracked which indicates that the tile cracks were not caused by differential movement in the underlying structural slab as claimed by the contractor. Also, the tile in this visitor entry area has not recracked since replacement.

b. Your claim for re-installation of medical gas compressors on seismic design-sized inertia blocks, and the relocation of peripheral equipment and access stairways associated with the compressor re-installation is denied. Moving the two medical gas compressors was the subject of lengthy negotiations culminating in a change order by which the contractor was compensated for the cost of relocating peripheral equipment and access stairways. The concrete inertia blocks were required to be both designed and constructed by the Contractor in accordance with paragraph IG-4 and IG-5.1.1. and IG-5.1.2 of the specifications. The Contracting Officer determined that the contract clearly requires proper inertia bases and that no entitlement is warranted for the costs associated with the fact that said bases were improperly sized and poured and later had to be removed and replaced with seismic design-sized inertia blocks. Further, the Contractor's own seismic design calculation applied a seismic snubber excursion (movement) assumption which dictated the size inertia block provided.

c. Your claim for correction of the nurse call system is hereby denied. After testing of the nurse call system, in accordance with specification section 16 G-8.2. Several discrepancies in the audio performance requirements of the nurse call consoles were discovered. You were directed to correct this non-conforming condition, under the Contract General Provisions, at no cost to the Government. While you contend

that the plans and specifications do not support the Government's interpretation, your attention is invited to the following contract requirements:

(1) NAVFAC Drawing #6075418(E-143) shows two separate nurse call terminal cabinets (NCTC) and a note on this sheet states: "All stations connected to nurse call NCTC-4A shall also be connected to nurse call NCTC-4C with full function control and operation."

(2) NAVFAC Drawing 60075423(E-148) also shows two separate NCTC and a note on this sheet states: "All stations connected to nurse call NCTC-5A shall also be connected to nurse call NCTC-5B with full function control and operation."

(3) Specification Section 16G-6.3.4.1 states: "Where indicated, master stations shall have full control over stations normally connected to another master station connected so that a call from a station may be answered from either master station."

Since this dual performance of interconnected nurse call stations was a contract requirement, your request for additional compensation to install this feature cannot be allowed. Furthermore, your contention that light annunciation on the consoles is satisfactory, cannot be construed as "full function and operation" since proper sound annunciation is not achieved. Clearly, the design intent of a communications system is to alert a nurse attending a patient that another person is in need of assistance.

d. Your claim for equitable adjustment in the amount of $83,361.00 and a 35-day extension of contract time for structural steel problems encountered during construction is hereby denied based upon the following finding: You contend that both the structural steel and architectural precast concrete (flat and spandrel extension wall panels) were built in accordance with contract plans and specifications, but upon erection of the precast panels they would not fit together without additional rework in the field. Further, you state that the method of attachment of mounting brackets was abnormal, resulting in "impossible" situation of matching bolts with

inserts and the tolerance allowances of various component elements would not allow erection assembly without excessive refitting, requiring additional labor and material beyond original contract requirements.

Your statement that the method of attachment of mounting brackets is "abnormal" is not justified by any supporting evidence. There is no standard precast panel attachment design; each building design varies to some degree. The attachment method called for in the instant case was not unique or untried. The attachment details shown on the plans were obvious and clearly shown on the NAVFAC Drawings 6075105 and 6075106, and should have been duly considered by any erection subcontractor experienced in precast panel erection.

Erection tolerances for structural steel were specified to be in accordance with the American Institute of Steel Construction (AISC) Code of Standard Practices as required by Contract Specification Section 5A-7.5. The AISC overall tolerances, when considered with respect to the exterior dimensions of the hospital, would allow a maximum deviation of approximately +2" to -1" in the length (N-S) on width (E-W).

Erection of precast panels was specified under Specification Section 3C; however, no erection tolerances for the precast panels were called out. Specification Section 3C-8.3 utilizes only general words such as "with sides plumb, and . . . slab ends . . . aligned." It is therefore significant to note that it was never specified that a greater degree of tolerance perfection be obtained in the installed precast panels than required in the steel framework from which it was hung, nor was such a requirement imposed upon the Contractor.

The Government-furnished design was correct and consistent with industry recommendations in existence at that time, and allowed for reasonable adjustment by the Contractor. Since Specification Section 3C-5.2 requires the Contractor to provide all required hardware needed for the erection of precast concrete members, your request for compensation for alleged extra material such as shims is without merit. Further, due to the responsibility of the prime contractor to coordinate the work of his subcontractors, additional labor cost related to

monitoring the work of separate steel and precast erectors cannot be a basis upon which the contract price can be adjusted. Finally, the responsibility for rework cannot be attributed to the Government.

e. Your claim for additional compensation in the amount of $273,567.00 and an extension of contract time of 250 days for Government-caused delays in connection with the fire alarm system is hereby denied based on the following:

Specifications Sections 16J and 16K, paragraph 1, require the Fire Alarm System to operate in conjunction with and become part of Specification Section "Security, Visual Signals and Conduit Systems." The fire alarm system specified and the security system utilize common alarm signal receiving panels, central console, printers, graphic projector and other units necessary for a complete operating system.

Section 16J-3.1 of the specifications requires submittals to include detailed working drawings showing layout and location of all equipment and complete point-to-point wiring diagrams of all equipment. All material and equipment to be used including internal wiring diagrams of equipment required proof of acceptance or listing by the testing laboratory. Sections 16K-7.1 and 9.1 require the Security and Visual Signal System to conform to the Underwriters' Laboratories (UL) Standard.

You failed to provide submittals in compliance with the specifications, and UL listing was obtained eight months after the initial January 1977 submittal and then only after the approval of your variance request. The submittal requirement for section 16J was not substantially completed until 28 April 1978. Delays in completing these systems resulted not only in delays to the usable completion date but in excess of 700 hours of additional Government fire watch by Naval personnel.

f. Your claim for additional compensation in the amount of $63,960.00 and an extension of contract time of 30 calendar days is hereby denied based upon the following:

You claim that Additive Bid 1C (awarded with the basic contract), which added veneer plaster to gypsum wall surfaces

actually led to the deletion of the epoxy liquid glaze coating (LGC) requirement and that flat alkyd paint was required for the ceiling areas.

Specification Section 9J-8 indicates LGC application as a system is independent of and not restricted to gypsum board surfaces. Contract Drawings 6074939 through 6074946, "Room Finish Schedule" provide LGC as the wall finish material in toilet rooms and rooms with similar exposure. Your claim also indicates that veneer plaster on gypsum board surfaces should receive TT-P-30 flat alkyd paint per Specification Section 9J-7.10. To the contrary, this section requires that flat alkyd paint be used on interior plaster and wallboard surfaces except waterproof gypsum board and surfaces scheduled to receive liquid glaze coating.

Your letters Serial 426-8203 of 3 April 1978 and Serial 426-8355 of 18 April 1978 confirm that room finishes will be per schedule and do not constitute a change of the contract requirements.

g. Your claim for additional compensation in the amount of $1,459,502 and an extension of contract time of 120 calendar days is hereby denied based upon the following:

NAVFAC Drawing 6075268 provides typical seismic bracing details for mechanical equipment. This drawing along with Specification Sections 1G and 15A form the contractual basis of the requirement for the contractor to provide adequate lateral support for non-structural equipment against earthquake induced motions. In addition, the Contracting Officer considers that Specification Section 1G is clearly applicable to seismic protection of equipment furnished under Section 15, in accordance with paragraph 1G-1.1 and 15A-8 and note 4 on NAVFAC Drawing 6075268.

Also of importance is the contract requirement of Specification 1G-5.1.2 to select the particular seismic snubber "based upon a complete dynamic analysis furnished by the Contractor and based on the seismic response data provided in Paragraph 5.1.8." Your initial submittals including your variance request

for a combined seismic snubber vibration isolator, did not conform to this requirement for specific dynamic analysis. Later your submittals proposed sizing of snubbers based on a "worst case" analysis which still did not adequately account for the differences in seismic response data provided by Specification Section 1G-5.1.8. Any delays occasioned regarding your submission of incomplete or unsatisfactory submittals are considered to be the responsibility of the contractor.

Your statement that 15A and 1G are contradictory is unsupported by any specific examples. The only incidence of disagreement between these two sections relates to maximum acceleration of equipment of either 3g (Paragraph 1G-5.1.4) or 4g (Paragraph 15A-12.6). Since the 4g requirement is less stringent of the two, the Government agreed to allow the contractor to be guided by this Standard.

The Contracting Officer also finds that the contract time is extended 84 calendar days for additional work set forth herein, and 7 calendar days for weather, making a total of 91 calendar days' extension of time justified for phase II. This results in a total delay of 152 calendar days for which the contractor is responsible at $2,500 per calendar day, making a total of $380,000 in liquidated damages assessed hereunder.

This assessment of liquidated damages is based upon the contractor's delays in performing fire proofing of 120 calendar days and 32 calendar days of contractor's responsibility for late installation of the fire alarm and security alarm system installed for the contractor by compuguard.

In the event that either of these bases of assessment of liquidated damages fails in whole or in part, then assessment of liquidated damages for the same number of calendar days should be attributed to the delay in the installation of critical metal studs on each of the hospital floors for the number of months listed.

Floor	Studs Delay
L-7	5.8 months
L-6	4.7 months
L-5	3.5 months
L-4	3.8 months
L-3	5.8 months
L-2	8 months
L-1	12 months
SL	14.5 months

In summary, the Contracting Officer finds the net sum of $147,580 due the contractor, computed as follows:

Part 1.	$ 307,623
Part 2.	181,360
Part 3.	39,396
Part 4.	(799)
TOTAL	$ 527,580
Less Liquidated Damages	$ 380,000
Net due contractor pursuant to this final decision	$ 147,580

The Contracting Officer finds no other additional money or time due the contractor or its subcontractors and suppliers on any other part of the contractor's claims for interest, errors and omissions in the plans and specifications, extended overhead, labor inefficiencies, Government-caused delays, Government-ordered changes, and further requests for additional contract time for any reason.

By copy of this final decision, the Commanding Officer, Western Division, is requested to issue a change order in conformance herewith.

This is the Final Decision of the Contracting Officer. Decisions on disputed questions of fact and on other questions that are subject to the procedure of the Disputes Clause may be appealed in accordance with the provisions of the Disputes

Clause. If you decide to make such as appeal from this Decision, written notice thereof (in triplicate) must be mailed or otherwise furnished to the Contracting Officer at the address at the head of this letter, Attention: Director, Contracts Division, within 30 days from the date you receive this decision. Such notice should indicate that an appeal is intended and should reference this Decision and identify the contract by number. The Armed Services Board of Contract Appeals is the authorized representative of the Secretary for hearing and determining such disputes. The rules of the Armed Services Board of Contract Appeals are set forth in the Defense Acquisition Regulation, Appendix A, Part Two. You are also advised that under the Contract Disputes Act of 1978, Public Law 95-563 (codified at 41 U.S.C. 601, et. seq.), you may elect to have your appeal processed pursuant to the provisions of that Act.

Very truly yours,

WALTER S. EVANS
Deputy Assistant Commander
For Contracts
By direction of the Commander
Naval Facilities Engineering
Command
Contracting Officer

Exhibits 1 and 2 attached.

APPENDIX G

Exhibit G

97th Congress HOUSE OF REPRESENTATIVES Report
1st Session No. 97-47

CONTRACT DISPUTES ACT

MAY 18, 1981.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. DANIELSON, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H.R. 1371]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1371) to amend section 12 of the Contract Disputes Act of 1978, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

The amendments are as follows:

Page 2, lines 1 and 2: Strike "July 1, 1979, and ending on December 31, 1979," and insert "January 1, 1981, and ending on June 30, 1981,".

Page 2, line 8: Strike "rate" and insert "rates".

Page 2, line 10: After "run", insert "and each six month period thereafter".

EXPLANATION OF AMENDMENTS

The committee amendments make two changes to the language of the bill. As introduced the bill would have required the Secretary of the Treasury to fix the rate of interest for contract claims at six month intervals beginning on "July 1, 1979 and

ending on December 31, 1979". This is the language contained in the bill in the 96th Congress as it passed the House. The amendment is to substitute the current six month period, that is the period beginning "January 1, 1981 and ending on June 30, 1981". This was suggested by the General Accounting Office and the letter of that office dated March 3, 1981 is appended to this report.

The second change in the bill is the addition of language to the end of the bill providing that the interest payable on contract claims is to be that fixed for each six month period during which the claim is pending. This makes it clear that the rate to be paid contractors on claims is that effective for the period which includes the date the contracting officer receives the claim and then the rate will change for each six month period during the pendency of claim when a different rate is fixed by the Secretary of the Treasury.

PURPOSE

The purpose of the proposed legislation, as amended, is to amend section 12 of the Contract Disputes Act of 1978 to delete the reference to the Renegotiation Board (which has been abolished) in connection with the interest rates established by the Secretary of the Treasury which apply to contract claims, and to require that the Secretary of the Treasury is to publish each rate in the Federal Register. The new language would require the Secretary of the Treasury to fix interest rates for the six month period beginning January 1, 1981 and for each six month period thereafter. In fixing such rates, the Secretary of the Treasury would be required to take into consideration the current private commercial rates of interest. Interest with respect to each particular claim is to be paid at the rate fixed by the Secretary of the Treasury for the period during which the contracting officer receives the claim and then at the rate applicable for each six month period as fixed by the Secretary during the pendency of that claim.

STATEMENT

In the 96th Congress, the bill H.R. 3909 was introduced in accordance with the recommendations of the Comptroller

General of the United States as contained in the letter to the Honorable Peter W. Rodino, Jr., Chairman of the House Committee on the Judiciary, on April 10, 1979. That letter is set forth at the end of this report. That bill was reported by the Committee on the Judiciary on October 10, 1979 and passed the House on October 15, 1979. However, the Senate did not act on the bill in that Congress. The current bill, H.R. 1371, was introduced in the form that the bill passed the House in the 96th Congress. In his 1979 letter to the Committee, the Comptroller General recommended that the Contract Disputes Act of 1978, Public Law 95-563, which was approved on November 1, 1978, be amended by revising the language of section 12. Section 13 of Public Law 95-563 provides that awards by agency boards of contract appeals and court judgments on claims under the Act are to be paid from the permanent indefinite appropriation established by section 724a of Title 31, U.S. Code. Payments from this appropriation are made upon certification by the Comptroller General. Interest on contract claims is authorized by section 12 of the law which states that interest is to be paid at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41 (85 Stat. 97) for the Renegotiation Board. The 92d Congress law provided that the Secretary of the Treasury was to establish interest rates for the Renegotiation Board. The Comptroller General originally pointed out on April 10, 1979, that since the Renegotiation Board was terminated as of March 31, 1979, it was not clear that the Secretary of the Treasury would be required to continue setting interest rates under Public Law 92-41. For this reason, the Comptroller General recommended an amendment to Section 12 of the Contract Disputes Act. The bill H.R. 1371 provides for a revised requirement that the Secretary of the Treasury will fix and publish interest rates applicable to contract claims.

As has been outlined in the statement of purpose, the revised language requires that the Secretary of the Treasury shall specify the interest rate at six month intervals. It further requires that the Secretary of the Treasury in determining the rate shall take into consideration current private commercial rates of interest for new loans maturing in approximately five years. The Secretary of the Treasury is further required to publish the rates he determines in the Federal Register. As to

particular claims, interest is initially to accrue at the rate fixed under section 12 for the period which includes the date on which the interest begins to run and then the rate fixed by the Secretary for each succeeding six month period is to apply for a claim pending during each such period.

The Comptroller General in his letter to the Chairman of the House Committee on the Judiciary noted that since the amendments in the bill are designed merely to incorporate the existing requirement concerning interest rates in restated language, it closely follows both the concept and the language of section 2(a) of Public Law 92-41, the law relating to the Renegotiation Board. One new element is the requirement that the Secretary of the Treasury publish the rates in the Federal Register. The Comptroller General pointed out that the Renegotiation Board had so published the rates. The committee agrees that the publication of the rates in the Federal Register is desirable and it is logical that the Act be amended to make this the responsibility of the Department of the Secretary of the Treasury who would also be responsible for establishing the rate.

Incident to its consideration of this bill, the committee was advised that there is some question concerning the time that interest begins to run despite the fact that section 12 clearly states that "Interest on amounts due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 6(a) * * *."

When Congress enacted the Contract Disputes Act of 1978, it was understood that submission of a claim in writing to a contracting officer under section 6(a) was the starting point for interest to begin to run on a contract claim. The separate provisions of section 6(c) requiring the "certification" of a claim and its supporting data when the claim is in excess of $50,000 was intended as a condition precedent to payment, but was not a delayed starting point for the interest accruing period. Certain agencies have argued that they have not "received" a claim under the Act until the necessary certification data has been submitted. This is not the correct interpretation. In fact, it

often leads to an unfair result in that a contractor does not have all the necessary supportive data available to satisfy certification procedures, when he initially notifies the agency in writing of a contract claim. It is likewise impossible for the contractor, at this stage of the proceeding, to anticipate what supplemental data might be requested by the contracting officer in the course of consideration of the claim. Certification under section 6(c) should not be viewed as a prerequisite to "receipt" of a claim under section 6(a).

The committee recommends that the bill be enacted. Its provisions assure continuity of the requirement that the Secretary of the Treasury establish the interest rates which are to apply to contract claims and clarifies the application of changes in such rates to pending claims. The enactment of the bill would remove any uncertainty which might exist as the result of the termination of the Renegotiation Board.

Statements under clause 2(1)(3)(A), clause 2(1)(3)(B), clause 2(1)(2)(B), clause 2(1)(3)(D), clause 2(1)(4), and clause 2(1)(3)(C) of rule XI and clause 7(a)(1) of rule XIII of the House of Representatives:

COST

(Rule XIII(7)(a)(1))

Enactment of the bill would result in no added cost. It does not provide for any new specific programs.

OVERSIGHT STATEMENT

(Rule XI 2(1)(3)(A))

The Subcommittee on Administrative Law and Governmental Relations of this committee exercises the committee's oversight responsibility in accordance with rule VI(b) of the Rules of the Committee on the Judiciary with reference to the subject of Government Contracts and Contract Disputes. The favorable consideration of this bill was recommended by that subcommittee has determined that legislation should be enacted as set forth in this bill.

BUDGET STATEMENT

(Rule XI 2(1)(3)(B))

Enactment of the bill would not create any additional cost for the Government pursuant to rule XIII(7)(a)(1). The bill does not involve new budget authority nor does it require new or increased tax expenditures as contemplated by clause 2(1)(3)(B) of rule XI.

COMMITTEE VOTE

(Rule XI 2(1)(2)(B))

On May 13, 1981, the full Committee on the Judiciary approved the bill H.R. 1371 by voice vote.

OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE ON GOVERNMENT OPERATIONS

(Rule XI 2(1)(3)(D))

No findings or recommendations of the Committee on Government Operations were received as referred to in subdivision (D) of clause 2(1)(3) of House Rule XI.

INFLATIONARY IMPACT

(Rule XI 2(1)(4))

In compliance with clause 2(1)(4) of House rule XI, it is stated that this legislation will have no inflationary impact on prices and costs on the operation of the national economy.

ESTIMATE OF THE CONGRESSIONAL BUDGET OFFICE

(Rule XI 2(1)(3)(C))

The following estimate was received from the Director of the Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., May 14, 1981.

Hon. Peter W. Rodino, Jr.,
Chairman, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

Dear Mr. Chairman: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed H.R. 1371, a bill to amend section 12 of the Contract Disputes Act of 1978, as ordered reported by the House Committee on the Judiciary, May 13, 1981.

The bill provides that the interest rate paid by the Federal Government on successful claims by contractors against the government shall be set by the Secretary of the Treasury, based on current private commercial rates. This amendment is intended to clarify the responsibilities of the Secretary of the Treasury, resulting from the termination of the Renegotiation Board.

It is expected that no additional cost to the government would be incurred as a result of enactment of this legislation.

Sincerely,

RAYMOND C. SCHEPPACH
(For Alice M. Rivlin, Director).

CHANGES IN EXISTING LAW

In compliance with paragraph 2 of clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

PUBLIC LAW 95-563

AN ACT To provide for the resolution of claims and disputes relating to Government contracts awarded by executive agencies

* * * * * * *

INTEREST

[Sec. 12. Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 6(a)

from the contractor until payment thereof. The interest provided for in this section shall be paid at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41 (85 Stat. 97) for the Renegotiation Board.]

Sec. 12. Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 6(a) from the contractor until payment thereof. The interest provided for in this section shall be paid at a rate which the Secretary of the Treasury shall specify as applicable to the period beginning on January 1, 1981, and ending on June 30, 1981, and to each six-month period thereafter. Such rate shall be determined by the Secretary of the Treasury, taking into consideration current private commercial rates of interest for new loans maturing in approximately five years. The Secretary of the Treasury shall publish each such rate in the Federal Register. Interest with respect to a particular claim shall be paid at the rate determined pursuant to this section for the period which includes the date on which interest begins to run and each six month period thereafter.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, D.C., April 10, 1979.

B-107871.
Hon. Peter W. Rodino,
Chairman, Committee on the Judiciary,
House of Representatives.

Dear Mr. Chairman: The purpose of this letter is to recommend an amendment to the Contract Disputes Act of 1978, Public Law No. 95-563 (November 1, 1978), 92 Stat. 2383. Section 13 provides that awards by agency boards of contract appeals and court judgments on claims under the Act shall be paid from the permanent indefinite appropriation established by 31 U.S.C. § 724a (1976), as amended. Payment from this appropriation is made upon certification by the Comptroller General. Section 12 authorizes the payment of interest and provides in pertinent part as follows:

"The interest provided for in this section shall be paid at the rate established by the Secretary of the Treasury pursuant

to Public Law 92-41 (85 Stat. 97) for the Renegotiation Board."

Pursuant to Public Law No. 92-41, the Secretary of the Treasury has established the interest rate for the period January -June 30, 1979. As you know, however, the Renegotiation Board terminated as of March 31, 1979. Thus, it is questionable whether, after June 30, the Secretary of the Treasury would be required to continue setting interest rates under Public Law No. 92-41.

To resolve this problem, we recommend amending section 12 of the Contract Disputes Act to establish an independent requirement based on the Renegotiation Board legislation. Our proposed amendment is set forth below:

'Sec. 1. Section 12 of the Contract Disputes Act of 1978, 92 Stat. 2389, is amended to read as follows:

'Sec. 12. Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 6(a) from the contractor until payment thereof. The interest provided for in this section shall be paid at *a rate which the Secretary of the Treasury shall specify as applicable to the period beginning on July 1, 1979, and ending on December 31, 1979, and to each six-month period thereafter. Such rate shall be determined by the Secretary of the Treasury, taking into consideration current private commercial rates of interest for new loans maturing in approximately five years. The Secretary of the Treasury shall publish each such rate in the Federal Register. Interest with respect to a particular claim shall be paid at the rate determined pursuant to this section for the period which includes the date on which interest begins to run.*' [New material italic.]

"Sec. 2. This Act shall be effective July 1, 1979."

Since our proposed amendment is designed merely to incorporate the existing requirement into the Contract Disputes Act, it closely follows both the concept and the language of section 2(a) of Public Law No. 92-41. The only new element is the requirement to publish the rates in the Federal Register.

Until now, the Treasury Department has not been publishing the rates, but the Renegotiation Board has done so. In our opinion, publication of the rates in the Federal Register is desirable, should continue, and should logically be the responsibility of the office which establishes the rates.

We are aware that legislation has been introduced to extend the life of the Renegotiation Board (*e.g.*, H.R. 2002, 96th Congress). Even if this legislation is enacted, we still believe our proposed amendment is desirable since the history of the Renegotiation Board indicates that the present situation may arise again. Our proposal would assure continuity of the requirement to establish interest rates by divorcing it from the uncertainties of the Renegotiation Board. Should the Board be revived, there would be no confusion since it would be clear that the requirements under Public Law No. 92-41 and section 12 of the Contract Disputes Act are the same.

We are concurrently submitting the same proposal to the Senate Committee on the Judiciary and the Senate Committee on Governmental Affairs.

Sincerely yours.

R.F. KELLER,
Deputy Comptroller General of the United States.

U.S. GENERAL ACCOUNTING OFFICE,
Washington, D.C., March 3, 1981.

William P. Shattuck, Esq.,
Counsel, Subcommittee on Administrative Law and Governtal Relations, Committee on the Judiciary, House of Representatives

Dear Mr. Shattuck: In recent telephone discussions with members of our staff, you raised certain questions concerning proposed legislation to amend section 12 of the Contract Disputes Act of 1978. A bill had been introduced in the 96th Congress (H.R. 3909) but action could not be completed prior to adjournment. The bill has been reintroduced in the 97th Congress as H.R. 1371.

Since the termination of the Renegotiation Board in 1979, the Treasury Department has continued to set interest

rates every six months and has published them in the Federal Register. Continuity has thus been maintained.

In its present form, H.R. 1371 retains the starting period specified in the original H.R. 3909—the period "beginning on July 1, 1979, and ending on December 31, 1979" (H.R. 1371, page 2, lines 1 and 2). This should be amended to read "beginning on January 1, 1981, and ending on June 30, 1981."

Please contact us if we can be of any further assistance.

Sincerely yours,

HARRY R. VAN CLEVE,
(For Milton J. Socolar, General Counsel).

Office - Supreme Court, U.S.
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CLERK

No. 82-651

In the Supreme Court of the United States

OCTOBER TERM, 1982

SANTA FE ENGINEERS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (FORMERLY THE UNITED STATES COURT OF CLAIMS)

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a contractor's failure to certify its claim in accordance with Section 6(c)(1) of the Contract Disputes Act of 1978, 41 U.S.C. (Supp. IV) 605(c)(1), is a jurisdictional bar to de novo adjudication by the Court of Claims of a contracting officer's denial of the claim.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The initial opinion of the Court of Claims (Pet. App. A-1 to A-4) and the opinion of the Court of Claims on motion for reconsideration (Pet. App. B-1 to B-2) are not reported.

JURISDICTION

The judgment of the Court of Claims was entered on June 4, 1982. A motion for reconsideration was denied on July 16, 1982 (Pet. App. B-1 to B-2). The petition for a writ of certiorari was filed on October 14, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).[1]

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[1]Two weeks before the petition for a writ of certiorari was filed, 28 U.S.C. 1255(1) was repealed, effective October 1, 1982, by Section 123 of the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25. The new legislation, inter alia, abolished the Court of Claims

STATEMENT

1. In 1976, petitioner was awarded a contract by the Department of the Navy to construct a hospital and related facilities (Pet. App. A-2). In March 1980, petitioner filed with the Navy's contracting officer a "global" claim requesting an overall equitable adjustment of the contract price (*id.* at A-2). The "global" claim purported to be a resubmission of 18 earlier contract disputes decided adversely to petitioner by the contracting officer,[2] plus several new claims (*ibid.*).

2. On May 5, 1981, petitioner, alleging jurisdiction under Section 10(a) of the Contract Disputes Act of 1978, 41 U.S.C. (Supp. IV) 609(a), brought this "direct access" case in the Court of Claims for de novo review of the "global" claim decision (Pet. App. A-2).[3] By order entered July 16, 1982, the court, relying on its earlier decision in *Paul E. Lehman, Inc.* v. *United States*, 673 F.2d 352 (Ct. Cl. 1982), held that it lacked Contract Disputes Act jurisdiction over the new disputes embraced within the "global" claim

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and created a new trial court, the United States Claims Court, and a new court of appeals, the United States Court of Appeals for the Federal Circuit. Appeals from the Claims Court are taken to the Federal Circuit. Review of decisions of the Federal Circuit is available in this Court by writ of certiorari pursuant to 28 U.S.C. 1254(1).

[2]Petitioner appealed each of the 18 adverse decisions to the Armed Services Board of Contract Appeals (ASBCA), which, at petitioner's request, dismissed them without prejudice in anticipation of a future consolidated proceeding on these and any later-filed claims (Pet. App. A-2).

[3]Petitioner simultaneously requested the ASBCA to suspend action on the consolidated administrative case. In the alternative, petitioner asked the Board to consider its Court of Claims petition as its complaint in the consolidated proceeding and provided a copy for that purpose, which the ASBCA accepted (Pet. App. A-2). The ASBCA proceeding was suspended during the pendency of petitioner's Court of Claims action (*id.* at A-2). The ASBCA is now considering whether it has jurisdiction over petitioner's new claims (Pet. 6).

because of the absence of the certification required by Section 6(c)(l) of the Act, 41 U.S.C. (Supp. IV) 605(c)(l) (Pet. App. B-2 n.*).[4] The court otherwise dismissed the petition for review without prejudice, leaving the ASBCA to decide the extent of its jurisdiction over all of petitioner's contract claims, including the ones asserted for the first time in the "global" claim (*id.* at B-2).[5]

ARGUMENT

1. Petitioner's contention (Pet. 5-6) that the Court of Claims erred in holding that the certification requirement of Section 6(c)(l) of the Contract Disputes Act is a jurisdictional prerequisite to a "direct access" lawsuit does not warrant this Court's review. The decision below, rendered by the court with primary authority for interpreting the Contract Disputes Act, is a reasonable interpretation of the statute and does not conflict with the decision of any other court. Moreover, this Court recently denied certiorari on the same question petitioner raises. *W.H. Moseley Co.* v. *United States,* cert. denied, No 81-2323 (Oct. 4, 1982). Petitioner's arguments do not differ significantly from those made in *Moseley* and, thus, do not justify this Court's review.

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[4] 41 U.S.C. (Supp. IV) 605(c)(1) provides in pertinent part:

> * * * For claims of more than $50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.

[5] In a prior order of June 4, 1982, the Court also ruled that the Contract Disputes Act did not give it jurisdiction over those of petitioner's 18 earlier claims decided by the contracting officer before the statute's effective date (Pet. App. A-4). That holding is not at issue here (Pet. 6).

2. Contrary to petitioner's contention (Pet. 10-12) and as we explained in our Brief in Opposition in *Moseley*,[2] the jurisdictional nature of the certification requirement is fully supported by the legislative history of the Contract Disputes Act. In *Paul E. Lehman, Inc.* v. *United States, supra*, 673 F.2d at 355, the Court of Claims examined that history and concluded that "[u]nless [the certification] requirement is met, there is simply no claim that this court may review under the Act." In particular, the court (*ibid.*; emphasis added) found persuasive the proposal made to Congress by Admiral Rickover to

> [r]equire as a matter of law that *prior to evaluation of any claim, the contractor must submit to the Government* a certification signed by a senior responsible contractor official, which states that the claim and its supporting data are current, complete and accurate. * * *"

See *Contract Disputes Act of 1978: Joint Hearings on S.2292, S.2787 and S.3178 Before the Subcomm. on Federal Spending Practices and Open Government of the Senate Comm. on Governmental Affairs and the Subcomm. on Citizens and Shareholders Rights and Remedies of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 21 (1978) [hereinafter cited as *Hearings*]. In adopting Section 6(c)(1) of the Act, Congress used language virtually identical to that proposed by Admiral Rickover. The Court of Claims justifiably concluded that Congress intended the certification requirement to be as stringent as the Admiral had indicated and, hence, to be jurisdictional in nature.

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[2]We are providing petitioner with a copy of our Brief in Opposition in *Moseley*.

Accordingly, the Court of Claims' interpretation is faithful to Congress' intent in passing Section 6(c)(1).[7]

3. Petitioner contends (Pet. 15-17) that the decision below conflicts with two "lines" of Court of Claims cases involving pre-Contract Disputes Act contracts: (1) *Folk Construction Co.* v. *United States*, Ct. Cl. No. 99-80C (Jan. 16, 1981), rehearing denied (Mar. 6, 1981), which held that Contract Disputes Act jurisdiction existed over an uncertified claim filed with the contracting officer *prior* to the statute's effective date (March 1, 1979) and decided thereafter, because the certification requirement was not yet in effect and, thus, the claim was valid when submitted; and (2) *Tuttle/White Constructors, Inc.* v. *United States*, 656 F.2d 644 (Ct. Cl. 1981), which held that the actions of the contractor disclosed a knowing election to litigate its claims before the contract appeals board under the terms of the contract and pre-Contract Disputes Act law, thus foreclosing its opportunity to elect a remedy under Section 16, Pub. L. No. 95-563, 92 Stat. 2391.

Any inconsistency in these decisions is a matter for the court below to resolve.[8] In any event, the decisions are

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[7]Petitioner suggests that the Court of Claims' interpretation of the certification requirement imposes an unreasonable burden upon contractors that frustrates Congress' intent to provide a streamlined claims resolution procedure (Pet. 12-15). Claim certification was designed by Congress to assure that contract claims have some basis in verifiable fact and to encourage settlements. *Hearings, supra*, at 26-35; S. Rep. No. 95-1118, 95th Cong., 2d Sess. 7 (1978). Hence, the requirement of prior certification is wholly consistent with Congress' desire to ensure that only meritorious claims are submitted. Moreover, prior certification is hardly onerous since the contractor need furnish only three simple representations for the claim to be directly reviewable by the Court of Claims.

[8]Petitioner acknowledges that it did not raise this purported "conflict" before the Court of Claims (Pet. 15 n.28). This Court normally will not consider issues that were neither raised nor considered in the lower courts. *United States* v. *Mitchell*, 445 U.S. 535, 546 n.7 (1980).

not in conflict. The holding in *Folk*, even if correct, is restricted to its unique set of facts, which, to our knowledge, has not reappeared in any other Court of Claims case. In *Tuttle/White*, all the court decided was that the contractor had affirmatively chosen its pre-Contract Disputes Act remedies. In dicta, the court discussed the times at which contractors must act to elect Contract Disputes Act coverage. But the timing of the election is a matter wholly distinct from whether the claim itself is valid for Contract Disputes Act purposes, that is, whether it has been properly certified.

4. Also unavailing is the argument (Pet. 17-20) that the decision below unfairly deprives petitioner of its "right" to litigate its new claims before the Court of Claims under the Contract Disputes Act.[9] That "right" exists only to the extent that petitioner complies with the limitations and conditions contained in the statute, which, as a waiver of sovereign immunity, must be strictly construed. *Brookfield Construction Co.* v. *United States*, 661 F.2d 159, 165 (Ct. Cl. 1981), citing *Soriano* v. *United States*, 352 U.S. 270, 276 (1957). The certification requirement is one of the limitations and conditions under which the United States has consented to be sued. Petitioner, by its own omission, failed to comply with that prerequisite and its "direct access" lawsuit accordingly is barred.[10]

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[9]Petitioner states that the ASBCA may refuse jurisdiction over its new claims, thus depriving it of any forum should the Court of Claims decision stand (Pet. 6, 18-20). This assertion is at best speculative since the ASBCA has not ruled on the question (see note 3, *supra*). Moreover, any such ASBCA decision may be appealed in accordance with applicable law. In any event, it is petitioner's obligation to satisfy the jurisdictional prerequisites regardless of the forum.

[10]*Skelly and Loy* v. *United States*, 685 F.2d 414 (Ct. Cl. 1982), on which petitioner relies (Pet. 14, 19), is inapposite. There, the plaintiff submitted an uncertified claim under its post-Contract Disputes Act contract. The contracting officer decided the claim and the plaintiff sought "direct access" in the Court of Claims. Consistent with its rulings

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

WILLIAM S. LIEBMAN
Attorney

NOVEMBER 1982

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in *Lehman* and *Moseley*, as well as here, the court dismissed the suit, holding that it lacked jurisdiction over the uncertified claim. Since the Contract Disputes Act provides the exclusive remedies for claims arising under a post-Act contract, the court, in dicta, suggested the procedure that a contractor might follow to obtain a reviewable decision: resubmit the claim to the contracting officer with a certification and, if the decision is adverse, seek review in accordance with the statute. The court did not, as petitioner states (Pet. 19), "direct" the contractor in *Skelly and Loy* to pursue this course.

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